

The Hon. Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MONIQUE BOND and BRIGITTE GINGRAS,

Plaintiffs,

vs.

CRUISEPORT CURACAO C.V., a foreign  
corporation; HOLLAND AMERICA LINE N.V.,  
a foreign corporation; and HOLLAND AMERICA  
LINE INC., a Washington corporation;

Defendants.

AT LAW AND IN ADMIRALTY

Case No. 2:17-cv-01639-MJP

PLAINTIFFS' TRIAL BRIEF

**I. OVERVIEW**

This cruise ship slip and fall case comes on for trial by jury beginning Friday, May 31. The injury to Monique Bond ("Bond") occurred on December 5, 2016. Bond and her wife, Brigitte Gingras, ("Gingras") were near the end of their 29-day cruise when Bond slipped on a wet, slippery tile on the upper deck of defendants' cruise ship. Bond severely injured her right knee. Bond and Gingras, both recently retired, are Canadian citizens living in Ottawa.

Liability is contested. There is little evidence of how Bond slipped and fell. The investigative report by the ship's Security Officer affords little help. Several spa employees in the

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1 area at the time of the fall were not interviewed. Attending nurses were not interviewed. The  
2 investigator did not secure the scene and did not indicate the time of his investigation. Surveillance  
3 cameras in the area were not trained on the area of the fall even though there had been five other  
4 reported and investigated falls in the precise area during the two-year period leading up to Bond's  
5 fall. Four of the five fall victims reported a slippery wet surface.

## 6 II ISSUES

7 There are two issues Plaintiff would like to address: 1) jury instructions regarding the  
8 duty of the defendant; and 2) the issue of pre-existing conditions.

9 **Instructions on Duty:** The duty to Bond by the defendant is to exercise reasonable care  
10 under the circumstances. Western Washington Federal District Court is the jurisdiction chosen by the  
11 defendant and contractually mandated by the cruise contract. Washington adopted Restatement  
12 (Second) of Torts § 343 regarding a landowner's duty to an invitee. Plaintiffs' Proposed Jury  
13 Instructions sets forth that duty, the exception (§ 343(A)), and Comments (f) to that exception. It is  
14 Plaintiffs' position that reasonable care under the circumstances of passengers on a cruise ship is the  
15 same as a landowner's duty to an invitee in the circumstances of this case.

16 **Preexisting Condition:** Plaintiff requests this Court rule in limine disallowing any  
17 testimony, evidence or argument concerning the Plaintiff's prior health history unless (1) it relates  
18 directly to the injuries and conditions claimed herein, **and**; (2) there is substantial evidence that  
19 those areas were symptomatic at or near the time of the subject collision; **and** (3) there is competent  
20 medical testimony supporting any such theory.

21 Defendant's CR 35 examiner speak of previous injuries and pre-existing conditions and  
22 treatment. It is anticipated that the defense will attempt to offer evidence of unrelated conditions  
23 or injuries the Plaintiff may have experienced prior to December 5, 2016, in an effort to impeach  
24  
25

1 the treating physician's long-term prognosis, or to otherwise call Plaintiff's injuries into doubt by  
2 eliciting speculation from the jury on the nature, extent, and cause of Plaintiff's injuries.  
3 Defendant's CR 35 examiner addresses alleged pre-existing conditions that were asymptomatic  
4 prior to the incident. Any preexisting condition or previous injury to her **back** is not directly or  
5 even indirectly related to her claimed **knee** injury, specifically a displaced and transverse  
6 comminuted fracture of her right patella and its sequellae.

7 Evidence of prior injury or condition alone is not relevant or admissible. A prior injury or  
8 condition is relevant only if it was symptomatic at or near the time of the subject collision and  
9 relates directly to the conditions complained of.

10 Even if there were a prior asymptomatic condition which left the plaintiff more vulnerable  
11 to injury, such would be inadmissible under WPI 30.18 - prior infirm condition - asymptomatic.  
12 *Sutton v Shufelberger*, 31 Wn. App 579, 584, 643 P.2d 820 (1982) is on point.

13 It is reversible error even to consider a case as one of aggravation, or to instruct the jury on  
14 aggravation of a pre-existing condition, if the alleged pre-existing condition was asymptomatic at  
15 the time of the injury. *Greenwood v. The Olympic, Inc.*, 51 Wn.2d 18, 23, 215  
16 P.2d 295 (1957); *Sutton v. Shufelberger*, 31 Wn. App. 579, 584, 643 P.2d 820 (1982).

17 The rule is that when a latent condition itself does not cause pain, suffering or a  
18 disability, but that condition plus an injury brings on pain or disability by  
19 aggravating the pre-existing condition and making it active, then the injury and  
20 not the dormant condition, is the proximate cause of the pain and disability.  
21 Thus, the party at fault is held for the entire damage as the direct result of the  
22 accident. *Bennett v. Messick* 76 Wn. 2d 474, 478-79, 457 P.2d 609 (1969)  
23 (citation omitted). *See also Jordan v. Seattle*, 30 Wash. 298, 302-03 (1902).  
24 (Emphasis added)  
25



1 The Washington Pattern Instructions recognize the distinction between asymptomatic pre-  
 2 existing conditions, which do not affect an injured person's right to recover damages, and  
 3 symptomatic pre-existing conditions, which allow an injured person only to recover damages for  
 4 the extent to which his or her injuries were different from, or an aggravation of, the preexisting,  
 5 symptomatic condition. Compare WPI 30.17 with WPI 30.18. The comments to WPI 30.18  
 6 (previous infirm condition) make it clear that the instruction should not be used in cases where  
 7 there is evidence of a pre-existing condition, but insufficient evidence that the condition was  
 8 symptomatic at the time of the injury. If there is no evidence that a pre-existing bodily  
 9 condition was causing pain or disability before the occurrence, then the lighting up of that pre-  
 10 existing condition makes a defendant liable for all damages proximately caused to the person in  
 11 that condition. There is no prior pain or disability to segregate.  
 12

### 13 III WITNESSES

14 Plaintiff will call the following lay witnesses who will be available to testify as indicated:

15	Monique Bond	May 31 through June 7
16	Brigitte Gingras	May 31 through June 7
17	Alannah Hanlen	June 3
18	Alan Bryant	June 3
19	Carole Gingras	June 3
20	Diane Platt	June 4 through June 6
21	Glenn Sheen	June 3
22	Linda Bérubé	June 4 through June 6
23	Mark Berlin	June 5 through June 6
24		
25		

Richard Roulx June 3

David Bateman Perpetuated

Plaintiff will call the following treating providers who may offer expert opinions and who will be available to testify as indicated:

Christopher W. Brown MD Perpetuated

Mehul Patel PT Perpetuated

John R. Cary, MA, CRC, CDMSA, VRC, OSC June 3 through June 7

Joellen Gill, M.S., CHFP, CXLT, CSP June 4 through June 6

Plaintiffs' counsel are keenly aware of the Court's timekeeping rule and will make every effort to move the trial along as efficiently as we can. Plaintiffs would like to point out, however, that Plaintiff bears the burden of proof and lay witnesses are necessary to the damages portion of Plaintiffs' case. The defense has designated three experts and three agents of the defendant.

#### IV OTHER MATTERS

##### A. Statements of Plaintiff Regarding Pain are Admissible.

In 20 Am. Jur. 493-95, Evidence, § 588, appears the following:

This is a general rule that where the physical condition of a person is relevant, the usual and natural expressions and exclamations of such person which are the spontaneous manifestations of pain and naturally flow from her sufferings are competent evidence, regardless of the person to whom they were uttered, and it will be observed, is distinct from the one which renders admissible, under an exception of the hearsay rule, or as original evidence, statements made by an injured or diseased person to her physician upon an examination by the latter for the purpose of treating the declarant. In many cases, expressions of pain and suffering are admissible *as res gestae*, provided the statements were made at the time of, or soon after, an accident. However, the rule which renders admissible the natural expressions of pain and suffering as proof of an existing condition is not so limited. The fact that expressions of present pain are made long after the injury is received will not render them inadmissible...

**B. Lay Witnesses Are Competent to Testify as to Plaintiff's Expression of Pain.**

There is no reason laymen may not testify as to their sensory perceptions, the weight of the testimony to be determined by the trier of fact. Physical movement by the injured person can be seen and described by a layman with no prior medical training and skill. Furthermore, an injured person may testify to subjective symptoms of pain and suffering and to the limitations of her physical movements.<sup>1</sup>

ER 803(a)(1) (present sense impression) and ER 803(a)(3) (then existing mental, emotional or physical condition), also permit lay witness testimony concerning a tort victim's pain and suffering.

The Washington Supreme Court has long taken a very liberal view regarding lay testimony about a plaintiff's injuries, permitting testimony on the following matters:

- Before the incident, plaintiff had the appearance of "a healthy looking man - a strong laborer". Afterwards, plaintiff was in an "excited condition" and was in an "impaired condition";
- Complaints made by plaintiff about the nature and extent of her injuries;<sup>2</sup>
- Changes in plaintiff's condition after injury, including particulars of her disposition and physical condition.<sup>3</sup>

Finally, ER 701 permits lay witnesses to testify in the form of opinions when those opinions are "rationally related to the perception of the witness".

**C. Defendant is Not Entitled to a Failure to Mitigate Instruction Regarding Physical Injuries.**

There is no evidence that Plaintiff failed to abide by her physicians instructions regarding

<sup>1</sup> *Bitzan v. Parisi*, 88 Wn.2d 116, 121-22, 558 P.2d 775 (1977).

<sup>2</sup> *Buell v. Park Auto Transportation Co.*, 132 Wash. 92, 96 (1924).

<sup>3</sup> *Truva v. Goodyear Tire and Rubber Co.*, 124 Wash. 445, 447 (1923).



1 her physical injuries. Defendants are not entitled to a jury instruction on failure to mitigate. Such  
2 an instruction was properly rejected where no evidence of failure to mitigate was presented:

3 This instruction should be used when "(1) there is evidence creating an issue of fact  
4 as to the injured person's failure to exercise ordinary care in receiving or submitting  
5 to medical treatment, and (2) the evidence permits a segregation of the damages  
6 resulting from that failure to exercise ordinary care." WPI 33.02 at 322.

7 Here, Marshall presented evidence that Hawkins failed to follow her doctor's advice  
8 [to join the YMCA or to follow up with her doctors for care. But Marshall did not  
9 present testimony or other evidence that Hawkins' omissions aggravated her  
10 conditions or delayed recovery. Accordingly, the evidence did not create a question  
11 of fact on the issue of mitigation of damages, and the trial court did not err in  
12 refusing to give such an instruction.<sup>4</sup>

13 Dated this 22<sup>ND</sup> day of May, 2019.

14 /s/ Karl Malling

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15 CLAUSEN LAW FIRM PLLC

16 /s/ Steven M. Malek

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25 <sup>4</sup> *Hawkins v. Marshall*, 92 Wn. App. 38, 962 P.2d 834 (1998).